No. 09-440

In the Supreme Court of the United States

WILLIAM H. SCHRAMM, PETITIONER

v.

RAY L. LAHOOD, SECRETARY, DEPARTMENT OF TRANSPORTATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that a notice of appeal that failed to designate the order from which appeal was sought and designated only an unrelated order from a separate case did not satisfy the requirement of Fed. R. App. P. 3(c)(1)(B) to "designate the judgment, order, or part thereof being appealed."

2. Whether Fed. R. App. P. 3 is jurisdictional.

3. Whether the court of appeals erred in holding that petitioner's allegation of a spontaneous assault by a former supervisor three years after he left the employ of the Federal Aviation Administration did not state a valid retaliation claim against the Secretary of Transportation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is not published in the *Federal Reporter* but is available at 318 Fed. Appx. 337. The February 11, 2008 order of the district court (Pet. App. 24a-32a) is not published but is available at 2008 WL 397592. The March 25, 2008 order of the district court (Pet. App. 33a-42a) is not published but is available at 2008 WL 820463.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 2009. A petition for rehearing was denied on July 14, 2009 (Pet. App. 43a-44a). The petition for a writ of certiorari was filed on October 12, 2009. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. During the 1990s, petitioner worked as an air traffic controller for the Federal Aviation Administration (FAA). In November 1998, petitioner began an administrative leave and retired the following year because of a psychological disability that rendered him unqualified to continue work as an air traffic controller. In May 2000, petitioner filed an action in federal court under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, against the Secretary of Transportation (Secretary), alleging that he had been the victim of sex discrimination during his time as an air traffic controller. The suit identified James Blumberg, a former supervisor, as one of the discriminating individuals. Summary judgment was granted in favor of the Secretary, and the decision was affirmed on appeal in July 2004. Pet. App. 2a.

While that discrimination suit was pending, petitioner asserts that two unrelated incidents of unlawful retaliation occurred. In response, petitioner filed two separate retaliation suits against the Secretary under Title VII. Those two retaliation suits give rise to the present petition.

2. Petitioner's first retaliation suit alleged a retaliatory assault. On December 18, 2002, petitioner's process server went to the airport to serve subpoenas on witnesses, including Blumberg, for the pending discrimination suit. The process server was denied entry to the control tower where the witnesses worked, but was allowed to wait in an adjacent area through which all employees needed to pass. Because the process server could not identify the witnesses, he telephoned petitioner, who came to the airport to assist in the identification. Petitioner alleges that he identified Blumberg as

Blumberg left the tower, that the process server pressed a subpoena onto Blumberg's shoulder, and that Blumberg swung his arm back in anger to avoid contact, causing the subpoena to fall to the ground. Pet. App. 3a.

Following this incident, petitioner waited for a period of time in the terminal after Blumberg left. As petitioner exited, he alleges that Blumberg drove around the corner of the building in a pick-up truck, pulled up alongside him, and began verbally abusing him. Petitioner alleges that he shouted to Blumberg that he had been served and then walked away, at which point Blumberg shifted his truck into reverse and drove towards petitioner before swerving away. Pet. App. 4a.

On November 7, 2003, petitioner filed a Title VII complaint in federal court alleging retaliatory assault. Petitioner alleged that Blumberg had assaulted him in retaliation for litigating his sex discrimination suit and that this assault constituted a form of retaliation by his former employer within the meaning of Title VII. Pet. App. 5a. Petitioner did not specifically allege that anyone at the FAA or that any of Blumberg's supervisors had knowledge of or condoned the alleged assault. He alleged only generally, using boilerplate language, that "the FAA had actual and constructive notice of the harassment described in this complaint." 3:03cv7655 Compl. ¶ 16 (N.D. Ohio Nov. 7, 2003).

3. Petitioner's second retaliation suit involved an unrelated series of events culminating in a medical disqualification. In February 2003, petitioner was hired as an air traffic controller for an FAA contractor that handles air traffic at smaller airports. As part of the hiring process, petitioner was required to apply for an FAA medical certification. He applied for and received the certification, indicating on his application that he was no

longer disabled nor taking any medications that would have disqualified him for a job as an air traffic controller. Pet. App. 4a-5a.

In August 2003, petitioner obtained a position with the United States Department of Defense, after which he was certified again, and was deployed to Uzbekistan. Pet. App. 5a.

On December 30, 2003, the FAA issued a letter notifying petitioner that, as part of a standard review process, it had determined he was not qualified for certification without a comprehensive psychological evaluation. After he underwent a medical examination by a psychiatrist in January 2005, petitioner received a new certificate. Pet. App. 6a.

On December 28, 2004, petitioner filed his second Title VII retaliation complaint in district court, alleging that the FAA's December 2003 decision to revoke his medical certification was in retaliation for his filing of the retaliatory assault case against the Secretary in November 2003. Pet. App. 6a-7a.

4. The two retaliation cases were consolidated by the district court but retained separate case numbers, and documents continued to be filed separately in each case. Pet. App. 1a-2a, 5a-6a. In a February 11, 2008 order, the district court granted summary judgment to the Secretary in the retaliatory assault case. *Id.* at 24a-32a. The court held that petitioner was not engaged in a protected activity at the time of the assault and therefore could not establish a prima facie case of retaliation under Title VII. *Id.* at 28a-31a. Although that order was entered in both retaliation cases, it did not address the medical disqualification suit. *Id.* at 7a-8a.

In a March 25, 2008 order, the district court granted summary judgment to the Secretary in the medical dis-

qualification case. Pet. App. 33a-42a. The court held that petitioner had not stated a prima facie case for retaliation under Title VII because he had not come forward with evidence to show that the responsible FAA officials had known about petitioner's retaliatory assault suit when they issued the medical disqualification letter. *Id.* at 39a-42a.

5. a. On April 1, 2008, following the second grant of summary judgment, petitioner filed notices of appeal in each of the two cases. Pet. App. 8a. In each notice of appeal, petitioner stated that he was appealing from the "Summary Judgment and Termination entered in this action on the 11th day of February, 2008." *Id.* at 8a-9a. The only order dated February 11, 2008 in either case is the order granting summary judgment in the retaliatory assault action. Petitioner did not designate the March 25 order disposing of the medical disqualification case in either of his notices of appeal. *Id.* at 9a.

On April 21, 2008, petitioner filed two statements of issues with the court of appeals, one for each case. Although the statement of issues in the medical disqualification case identified the medical disqualification issue, it again designated only the February 11 order disposing of the retaliatory assault case. 08-3420 Statement of Parties and Issues (6th Cir. filed Apr. 21, 2008). Petitioner thus did not designate the district court's March 25 order in either of the notices of appeal or in either of his statements of issues.

b. The court of appeals consolidated the two appeals and dismissed in part and affirmed in part in an unpublished *per curiam* opinion. Pet. App. 1a-23a.

The court of appeals raised sua sponte the question whether there had been an effective notice of appeal from the March 25 order in the medical disqualification

case. After ordering supplemental briefing on that question, the court dismissed that appeal. The court explained that Fed. R. App. P. 3(c)(1)(B) requires that a notice of appeal "designate the judgment, order, or part thereof being appealed," and that circuit precedent did not permit the court to look beyond the notice of appeal to surmise what orders or rulings a party might have intended to appeal. Based on petitioner's failure to designate the March 25 order, the court held that petitioner had not properly noticed an appeal from the order granting summary judgment in that case. Stating that Rule 3 imposes jurisdictional requirements that may not be waived, the court dismissed the appeal in the medical disqualification case for lack of jurisdiction. Pet. App. 10a-16a.

The court of appeals next affirmed the district court's grant of summary judgment to the Secretary in the retaliatory assault case. Pet. App. 16a-23a. Although the court concluded that a genuine issue of material fact existed as to whether petitioner had engaged in protected conduct in assisting the process sever, it held that the Secretary could not be held vicariously liable under Title VII for Blumberg's conduct. Specifically, the court relied on the "peculiar facts of this case," including that petitioner had not been employed by the FAA for several years, that Blumberg was no longer his supervisor, and that Blumberg's actions were "spontaneous and occurred in a non-work setting." *Id.* at 21a-22a. The court concluded that because of "the unique circumstances of this case, [petitioner]'s proper remedy lies against Blumberg under tort law," not against the Secretary under Title VII. *Id.* at 22a.

ARGUMENT

1. Petitioner, represented by counsel, filed notices of appeal in each of two separate cases. Each notice of appeal designated only the February 11, 2008 order disposing of the retaliatory assault case, and neither designated the March 25, 2008 order in the medical disqualification case. Pet. App. 8a-9a. Petitioner nonetheless contends (Pet. 13-35) that he should be permitted to appeal the March 25 order. Petitioner argues that in evaluating whether he satisfied Fed. R. App. P. 3(c)(1)(B)'s explicit requirement to "designate the judgment, order, or part thereof being appealed," the court should have looked beyond the notice of appeal itself to other circumstances indicating his intent to appeal the March 25 order. According to petitioner, ten other circuits hold that under Rule 3(c)(1)(B) "appellate courts can and should look to documents and events outside the notice of appeal itself in determining what orders and issues have been appealed." Pet. 17. But an examination of the holdings of the cases petitioner cites reveals no clear conflict. All of the circuits, including the Sixth Circuit, attempt to determine the intent of the appellant. Although the circuits differ in the materials they consider in determining that intent in cases involving orders covering related issues or claims, no circuit appears to permit appeal of an undesignated order that is wholly unrelated to the order designated in the notice of appeal. Accordingly, further review is not warranted in this case.

a. Petitioner cites at least nine cases from other circuits permitting appeal of certain non-final orders preceding a final judgment in a case even when a notice of appeal designates only the order representing the final

judgment.[1] That is also the practice in the Sixth Circuit. See *Caudill* v. *Hollan*, 431 F.3d 900, 905-906 (2005); *Crawford* v. *Roane*, 53 F.3d 750, 752-753 (1995), cert. denied, 517 U.S. 1121 (1996); *Caldwell* v. *Moore*, 968 F.2d 595, 598 (1992). Similarly, petitioner cites numerous cases from other circuits permitting appeal of an underlying judgment (or some aspect thereof) even when the notice of appeal designates only an order resolving post-judgment motions.[2] That too is the practice

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[1] See *Sahu* v. *Union Carbide Corp.*, 548 F.3d 59, 65-66 (2d Cir. 2008); *New York Life Ins. Co.* v. *Deshotel*, 142 F.3d 873, 884 (5th Cir. 1998); *Hartsell* v. *Duplex Prods., Inc.*, 123 F.3d 766, 771 (4th Cir. 1997); *ELCA Enters., Inc.* v. *Sisco Equip. Rental & Sales*, 53 F.3d 186, 189 (8th Cir. 1995); *Montes* v. *United States*, 37 F.3d 1347, 1351 (9th Cir. 1994); *Levald, Inc.* v. *City of Palm Desert*, 998 F.2d 680, 691 (9th Cir. 1993), cert. denied, 510 U.S. 1093 (1994); *United States* v. *Ramirez*, 932 F.2d 374, 375-376 (5th Cir. 1991); *Taylor* v. *United States*, 848 F.2d 715, 718 (6th Cir. 1988); *Wright* v. *American Home Assurance Co.*, 488 F.2d 361, 363 (10th Cir. 1973).

[2] See *Cornelius* v. *Home Comings Fin. Network, Inc.*, 293 Fed. Appx. 723, 726 (11th Cir. 2008); *Messina* v. *Krakower*, 439 F.3d 755, 759 (D.C. Cir. 2006); *Blockel* v. *J.C. Penney Co.*, 337 F.3d 17, 24 (1st Cir. 2003); *Chamorro* v. *Puerto Rican Cars, Inc.*, 304 F.3d 1, 4 (1st Cir. 2002); *Independent Petroleum Ass'n of Am.* v. *Babbitt*, 235 F.3d 588, 593 (D.C. Cir. 2001); *Town of Norwood* v. *New Eng. Power Co.*, 202 F.3d 408, 415 (1st Cir.), cert. denied, 531 U.S. 818 (2000); *Pacitti* v. *Macy's*, 193 F.3d 766, 777 (3d Cir. 1999); *Foretich* v. *ABC*, 198 F.3d 270, 273 n.4 (D.C. Cir. 1999); *Ametex Fabrics, Inc.* v. *Just In Materials, Inc.*, 140 F.3d 101, 106 (2d Cir. 1998); *United States* v. *Morales*, 108 F.3d 1213, 1222-1223 (10th Cir. 1997); *LeBlanc* v. *Great Am. Ins. Co.*, 6 F.3d 836, 839 (1st Cir. 1993), cert. denied, 511 U.S. 1018 (1994); *Turnbull* v. *United States*, 929 F.2d 173, 178 (5th Cir. 1991); *United States* v. *Lopez-Escobar*, 920 F.2d 1241, 1244 (5th Cir. 1991); *Friou* v. *Phillips Petroleum Co.*, 948 F.2d 972, 974 (5th Cir. 1991); *Mallis* v. *Bankers Trust Co.*, 717 F.2d 683, 693 (2d Cir. 1983); *Simpson* v. *Norwesco, Inc.*, 583 F.2d 1007, 1009 n.2 (8th Cir. 1978); *Jones* v. *Nelson*, 484 F.2d 1165, 1168 (10th Cir. 1973).

in the Sixth Circuit. See *Harris* v. *United States*, 170 F.3d 607, 608 (1999); *Boburka* v. *Adcock*, 979 F.2d 424, 426 (1992), cert. denied, 508 U.S. 961 (1993). These two situations describe the great majority of the cases relied on by petitioner. See Pet. 17-29.

Petitioner cites some other cases in which courts of appeals have looked outside the notice of appeal, but they are distinguishable from the present context. In those cases, the courts inferred an undisputed intent to appeal the undesignated issues and orders primarily when those issues and orders were closely related to those designated in the notice of appeal. For example, courts have looked beyond the notice of appeal when determining whether a prior non-appealable order should be deemed encompassed within the designation of the final judgment (consistent with the uniform rule noted above, see note 1, *supra*). See, *e.g.*, *Montes* v. *United States*, 37 F.3d 1347, 1351 (9th Cir. 1994). And they have done so where the notice of appeal itself had designated an order raising a related issue or claim. See, *e.g.*, *Satterfield* v. *Johnson*, 434 F.3d 185, 190-191 (3d Cir.) (permitting appeal of timeliness issue where appellant had designated a merits issue from the same order), cert. denied, 549 U.S. 947 (2006); *KH Outdoor, LLC* v. *City of Trussville*, 465 F.3d 1256, 1260 (11th Cir. 2006 (permitting appeal of order granting nominal damages where appellant had designated subsequent order setting amount of nominal damages); *Bogart* v. *Chapell*, 396 F.3d 548, 554-555 (4th Cir. 2005) (permitting appeal of order denying motion to amend judgment based on new evidence where appellant had designated entry of the underlying judgment); *Simpson* v. *Lear Astronics Corp.*, 77 F.3d 1170, 1173 (9th Cir. 1995) (inferring from "both [appellant]'s notice of appeal, stating that he was

appealing the 'order to pay attorney fees,' and the arguments contained in [appellant]'s opening brief, that [appellant] intended to appeal both the order imposing sanctions and the order setting their amount").

Here, by contrast, petitioner's notice of appeal in the medical disqualification case did not designate any order related to an issue in that case or to the March 25 summary judgment order, but rather designated only the February 11 order granting summary judgment in the separate retaliatory assault case. When a notice of appeal designates an order resolving a certain claim or case, the courts of appeals have held that Rule 3(c)(1)(B) does not permit appellate review of orders disposing of completely unrelated claims or cases. See, *e.g.*, *Kotler* v. *American Tobacco Co.*, 981 F.2d 7, 11 (1st Cir. 1992); *Mariani-Giron* v. *Acevedo-Ruiz*, 945 F.2d 1, 3 (1st Cir. 1991); *Pope* v. *MCI Telecomms. Corp.*, 937 F.2d 258, 266-267 (5th Cir. 1991), cert. denied, 504 U.S. 916 (1992); *Roberts* v. *College of the Desert*, 870 F.2d 1411, 1418-1419 (9th Cir. 1988); *Jordan* v. *Young*, No. 85-5316, 1986 WL 16907, at **2-3 (6th Cir. Apr. 4, 1986); *Pitney Bowes, Inc.* v. *Mestre*, 701 F.2d 1365, 1374-1375 (11th Cir.), cert. denied, 464 U.S. 893 (1983); *C.A. May Marine Supply Co.* v. *Brunswick Corp.*, 649 F.2d 1049, 1056 (5th Cir.), cert. denied, 454 U.S. 1125 (1981); *Elfman Motors, Inc.* v. *Chrysler Corp.*, 567 F.2d 1252, 1254 (3d Cir. 1977); *Terkildsen* v. *Waters*, 481 F.2d 201, 206 (2d Cir. 1973). As the court explained in *Kotler*:

> Omitting the preemption order while, at the same time, designating a completely separate and independent order loudly proclaims [an appellant's] intention not to appeal from the former order.

981 F.2d at 11; cf. *C.A. May Marine Supply Co.*, 649 F.2d at 1056 ("Where parts of the judgment are truly independent, there is more likelihood that the designation of a particular part in the notice of appeal will be construed as an intent to leave the unmentioned portions undisturbed.").

That rule extends to the circuits that in other circumstances consider materials outside the notice of appeal to ascertain the appellant's intent for Rule 3 purposes. See pp. 7-9, *supra*. It is one thing to consult external sources to divine an appellant's intent to appeal related orders or issues; it is quite another to rely on such sources to infer an appellant's intent to appeal entirely unrelated orders from a separate case. Accordingly, there appears to be no direct conflict on how to interpret the scope of a notice of appeal where the undesignated order disposes of claims neither factually nor procedurally related to the those in the designated order.

Given the extant rule that a notice of appeal designating one order is not effective as to completely unrelated orders, even an expansive view of what outside sources can be considered would not aid petitioner. The two orders from which petitioner seeks to appeal not only resolved completely different issues—an assault claim and a medical disqualification claim—but they were in fact part of two separate cases filed more than a year apart. Pet. App. 5a-8a. Therefore, this unusual case is not an appropriate vehicle to resolve any differences in approach between the circuits as to what materials beyond the notice of appeal may ordinarily be con-

sidered to determine the scope of the notice under Rule 3(c)(1)(B).[3]

b. Contrary to petitioner's argument (Pet. 29-31), nothing in *Becker* v. *Montgomery*, 532 U.S. 757 (2001), or *Foman* v. *Davis*, 371 U.S. 178 (1962), compels a different result either. In *Becker*, the Court held that a pro se plaintiff's timely but unsigned notice of appeal was functionally equivalent to an effective notice of appeal. 532 U.S. at 761. In *Foman*, this Court held that a premature notice of appeal of a judgment, coupled with a timely notice of appeal from an order denying post-judgment relief, was effective to appeal the former judgment. 371 U.S. at 180-182. Neither *Becker* nor *Foman* addressed the situation here, where petitioner seeks appeal of an undesignated order involving unrelated issues from an unrelated case.

One purpose of Rule 3 is "to ensure that the filing provides sufficient notice to other parties and the courts." *Smith* v. *Barry*, 502 U.S. 244, 248 (1992). That purpose is served when "no genuine doubt exists about who is appealing, from what judgment, to which appellate court." *Becker*, 532 U.S. at 767. According to *Smith*, the time period for determining whether any "genuine doubt exists" is the period for filing a notice of appeal designated by Fed. R. App. P. 4. 502 U.S. at 249. Although the appellants in *Becker*, *Foman*, and *Smith* had technically failed to comply with the requirements

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[3] The fact that the February 11 order granting summary judgment to the Secretary in the retaliatory assault case was also entered in the medical disqualification case does not help petitioner. Petitioner's filing of a notice of appeal in each case that requested an appeal of the "Summary Judgment and Termination entered in this action on the 11th day of February, 2008" could have signaled merely an abundance of caution by petitioner to avoid losing the ability to appeal that order.

of Rule 3, they each nonetheless had manifested—without any doubt and within the time limits prescribed by Rule 4—an intent to appeal from a specific judgment. See *Foman*, 371 U.S. at 182; *Becker* 532 U.S. at 760-761; *Smith*, 502 U.S. at 246.

Unlike in those cases, petitioner's intent to appeal the judgment in the medical disqualification case was not without "genuine doubt" at the end of the period designated by Rule 4 for filing a notice of appeal. Each of petitioner's notices of appeal manifests an unequivocal intent to appeal only from the retaliatory assault order. Petitioner argues (Pet. 34) that his statements of issues, which were filed with the court of appeals within the time limits for noticing an appeal, manifest a different intent. As petitioner asserts, the statement of issues filed in the medical disqualification case raises the medical disqualification issue. But it also designates only the district court's final judgment in the retaliatory assault case (the February 11, 2008 order) as the order to be appealed and fails to designate the district court's final judgment in the medical disqualification case. The statement, even read in conjunction with the notice of appeal, therefore did not contain all of the information—in particular, a designation of the order or judgment from which the appeal is being taken—required by Rule 3(c)(1)(B).[4]

2. In a supplemental brief, petitioner presents a new claim: that "the Court's decision in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), that Rule 3 * * * is jurisdictional, should be overruled." Supp. Pet. 11. In

[4] Petitioner also relies (Pet. 34) on his appellate briefs as demonstrative of his intent to appeal both orders. Those briefs, however, were filed after the time limits for filing a notice of appeal under Rule 4 had expired. Pet. App. 9a-10a.

Torres, the Court held that the requirements of Fed. R. App. P. 3(c) are jurisdictional. 487 U.S. at 320-321. Petitioner characterizes *Torres* as resting "in particular on the interpretation of the Advisory Committee that originally drafted Rules 3 and 4." Supp. Pet. 1. Petitioner contends that in *Union Pacific Railroad* v. *Brotherhood of Locomotive Engineers & Trainmen General Committee of Adjustment*, 130 S. Ct. 584 (2009), this Court "seriously undermined the specific reasoning" of *Torres* by holding that "the views of those who framed a rule as to whether it is jurisdictional are irrelevant unless Congress has by statute authorized those officials to create a jurisdictional requirement." Supp. Pet. 5. Petitioner argues that, as was the case with the Railway Labor Act at issue in *Union Pacific*, the Rules Enabling Act does authorize rules which limit the subject-matter jurisdiction of the lower courts, and the Federal Rules of Appellate Procedure thus cannot contain such limits.

Petitioner's new claim does not warrant this Court's review. As an initial matter, petitioner's supplemental brief argues an issue not raised in his petition for certiorari. Although Supreme Court Rule 15.8 permits the filing of a supplemental brief while a petition is pending to "call[] attention to new cases," it does not license a petitioner to formulate entirely new questions presented that could have been previously raised in the petition itself. See Eugene Gressman et al., *Supreme Court Practice* § 6.27, at 471 (9th ed. 2007). That is essentially what petitioner has done here—after the period for petitioning for certiorari has expired—arguing for the first time in his supplemental brief that Rule 3 should not be construed as jurisdictional.

On the merits, even assuming that *Union Pacific* stands for the proposition that procedural rules are ju-

risdictional only if Congress intended to confer jurisdictional authority on the rulemaking body, that would not undermine the Court's holding in *Torres*. In describing the distinction between claims processing and jurisdictional rules, the Court in *Union Pacific* itself noted the statutory and hence jurisdictional character of certain aspects of the notice of appeal:

> In contrast, relying on a long line of this Court's decisions left undisturbed by Congress, we have reaffirmed the jurisdictional character of the time limitation for filing a notice of appeal stated in 28 U.S.C. § 2107(a).

130 S. Ct. at 597 (citing *Bowles* v. *Russell*, 551 U.S. 205, 209-211 (2007)). Section 2107(a), which imposes the time limits appearing in Rule 4 for filing a notice of appeal, creates a statutory requirement that this Court has repeatedly found to be jurisdictional.

That analysis informs the jurisdictional nature of Rule 3 as well. Contrary to petitioner's characterization, the Court in *Torres* did not base its interpretation of Rule 3 as jurisdictional on the interpretation of the Advisory Committee or even from the content of Rule 3 itself. Instead, the Court explained that the jurisdictional nature of Rule 3 derives from the jurisdictional nature of the time limits in Rule 4:

> We believe that the mandatory nature of the time limits contained in Rule 4 would be vitiated if courts of appeals were permitted to exercise jurisdiction over parties not named in the notice of appeal. Permitting courts to exercise jurisdiction over unnamed parties after the time for filing a notice of appeal has passed is equivalent to permitting courts to extend the time for filing a notice of appeal. Because the

> Rules do not grant courts the latter power, we hold that the Rules likewise withhold the former.

Torres, 487 U.S. at 315. In other words, the *Torres* Court held that the requirements of Rule 3—which establish the contents of a notice of appeal—must be jurisdictional, because a party who has not complied with those requirements has not filed a timely or effective notice of appeal and that failure creates a jurisdictional defect under Rule 4 and 28 U.S.C. 2107(a). The Court in *Torres* went on to explain why it found "support for [its] view in the Advisory Committee Note following Rule 3," 487 U.S. at 315, but did not base its holding on that ground.

In any event, as petitioner acknowledges (Supp. Pet. 2), every court of appeals has held that Rule 3 is jurisdictional in nature. There is thus no conflict warranting further review.

3. Petitioner contends (Pet. 35-37) that the court of appeals' decision on his retaliatory assault claim conflicts with *Robinson* v. *Shell Oil Co.*, 519 U.S. 337 (1997), and *Burlington Northern & Santa Fe Railway* v. *White*, 548 U.S. 53 (2006). Further review of this issue is not warranted.

The court of appeals' decision does not conflict with either *Robinson* or *White*. In *Robinson*, this Court held that Title VII's definition of employees includes former as well as current employees. 519 U.S. at 346. In *White*, this Court held that the private-sector retaliation provision of Title VII "extends beyond work-place-related or employment-related retaliatory acts and harm" and includes any conduct that would dissuade "a reasonable worker from making or supporting a charge of discrimination." 548 U.S. at 67-68 (quoting *Rochon* v. *Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)). But the

court of appeals did not affirm the grant of summary judgment for the Secretary simply because petitioner was a former rather than a current employee (*Robinson*) or simply because the alleged retaliation occurred outside the workplace (*White*). Rather, it held that petitioner's "proper remedy [lay] against Blumberg under tort law," Pet. App. 22a, because, under settled agency principles, the acts complained of could not be attributed to petitioner's former employer, *id.* at 21a-22a.

Based "on the general common law of agency," an employer is generally responsible under Title VII for the conduct of an employee if the conduct violating Title VII occurred within the employee's scope of employment. *Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742, 754-755 (1998) (quoting *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 740 (1989)) ("Congress has directed federal courts to interpret Title VII based on agency principles."). "[I]t is accepted that 'it is less likely that a willful tort will properly be held to be in the course of employment and that the liability of the master for such torts will naturally be more limited.'" *Id.* at 756 (quoting Floyd R. Mechem, *Outlines of the Law of Agency* § 394, at 266 (4th ed. 1952)). An intentional tort may be within the scope of employment when it is "actuated, at least in part, by a purpose to serve the [employer]," *e.g.*, a salesperson who lies to complete a sale. *Ibid.* (brackets in original) (quoting Restatement (Second) of Agency § 228(1)(c) (1958)). As a counter-example, the Court noted that sexual harassment is beyond the scope of employment. *Id.* at 757.

Under common law agency principles, if the conduct occurs outside the scope of employment, the employer is liable in only four circumstances: (a) if the employer intended the conduct or the consequences; (b) if the em-

ployer was negligent or reckless in allowing the conduct to occur; (c) if the conduct violated a non-delegable duty of the employer; or (d) if the employee purported to act or to speak on behalf of the principal and relied upon apparent authority, or was aided in accomplishing the tort by the existence of the agency relation. *Ellerth*, 524 U.S. at 758.

Applied "to the peculiar facts of this case" (Pet. App. 21a-22a), these basic agency principles—adopted by this Court in *Ellerth* and other cases in the Title VII context—demonstrate the correctness of the court of appeals' holding that the Secretary could not be held vicariously liable for Blumberg's alleged assault on petitioner. Blumberg's alleged conduct falls far beyond the scope of his employment. According to petitioner's account, Blumberg's motivation in driving his truck at petitioner appears to have been his own personal anger at being served with a subpoena. *Id.* at 3a (describing Blumberg's "face and body language" as reflecting "rage" when he was served); *id.* at 4a (describing Blumberg's alleged verbal assault). Moreover, an assault with an automobile cannot in this context be considered to serve the purposes of a governmental employer—in contrast to, for example, a lie by an employee to complete a sale.

Blumberg's alleged conduct also would not fall within any of the four circumstances where an employer can be liable for conduct that goes beyond the scope of employment. Petitioner does not argue that the Secretary or anyone else at the FAA intended that Blumberg assault petitioner or were negligent in allowing such an assault—a spontaneous act beyond the control of any of Blumberg's supervisors. Pet. App. 2a-4a. Nor has petitioner alleged that the Secretary or anyone else at the

FAA either condoned or ratified Blumberg's actions, and no non-delegable duty of the Secretary or the FAA is at issue here. Further, there is no evidence that Blumberg acted on behalf of the Secretary or the FAA, and Blumberg was in no way aided by the agency relationship in the alleged commission of the tort. And Blumberg's former status as a supervisor had no relation to his ability to assault petitioner. *Ibid.*

In any event, petitioner does not allege that the court of appeals' decision conflicts with any decision of another court of appeals on this issue, and the factbound application of well established agency principles in this Title VII case does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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